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INTERNATIONAL

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

INDIA-PAKISTAN DISPUTE SETTLED

A MICABLE settlement of a dispute between the Governments of India and Pakistan, which involved permission for Indian aircraft to fly a direct route between New Delhi, India, and Kabul, Afghanistan, was announced in January. The agreement permits Indian civil aircraft to fly over Pakistani territory to Kabul without having to follow the lengthy detour which has been necessary. The detour was aggravated by the lack of aviation fuel in Afghanistan which obliged aircraft to carry sufficient fuel for the return journey.

The Government of Pakistan originally refused to allow Indian civil aircraft to cross into Afghanistan directly from Pakistan. The Indian Government brought the matter to the attention of the Council of ICAO in April, 1952. Both nations are members of ICAO and the Council, after receiving detailed information from both Governments, encouraged them to continue direct negotiations.

The Agreement opens two 20-mile wide corridors which Indian civil aircraft will follow from the airports to Lahore and Karachi, both in Pakistani territory to points in Afghanistan. The corridor on the route between Delhi and Kabul still requires some detour from the direct route, but it permits a much shorter and more direct flight than was previously allowed. The Government of Pakistan has also arranged for the export of sufficient aviation fuel to Afghanistan by overland routes through Pakistan to permit Indian aircraft to refuel there.

SEVENTH SESSION OF ASSEMBLY

The Seventh Session of the Assembly will be held in Brighton, England, commencing on June 16th. This will be a general session, the first since 1950, and it is expected to last from three to four weeks. The provisional agenda includes a report of the Council, an election of States to be represented on the Council and the reports by Commissions and Committees of the Assembly and action on the reports.

On the agenda of the Executive Committee, are such subjects as the Discharge by Contracting States of financial obligations to the Organization, including: payment of contributions within the year due; contributions in arrears; and action to be taken when a State fails to discharge its financial obligations. Other subjects will be, Technical Assistance for Economic Development, Policy with respect to amendments to or revision of the Convention, and the Revised Constitution of the Legal Committee.

The Technical Commission will discuss the program of future work including further development and implementation of International Standards, Recommended Practices and Procedures by States and the relationship of Annexes to Procedures for Air Navigation Services. The Commission will also examine the use of air navigation conferences and divisional meetings and the use, of standing committees and panels of experts to expedite the work.

On the agenda of the Economic Commission, aside from a general review of the future program and of the working methods of the organization in the economic field, it is planned to examine prospects and methods for further international agreement on commercial rights in international air transport with respect to scheduled international air services and non-scheduled air transport operations and charges for airports and air navigation facilities.

The Administrative Commission will take up the 1954 Budget, review expenditures and accounts for 1952, consider the payments of assessments by States in the first quarter of the financial year and determine the apportionment of expenses among the Contracting States.

LEGAL COMMITTEE TO MEET IN RIO DE JANEIRO

The Council has accepted the invitation of the Brazilian government to hold the Ninth Session of the Legal Committee in Brazil. The main task of this Session, which will convene on August 25th, will be to study and revise the text of a draft convention prepared by a subcommittee of legal experts in Paris last January, which is intended to replace or amend the Warsaw Convention.

LIBYA BECOMES ICAO MEMBER

The United Kingdom of Libya became the 59th member nation on February 28, 1953, thirty days after the deposit of its instrument of adherence.

NORTH ATLANTIC OCEAN STATION MEETING

Fourteen nations participating in the 1949 agreement on North Atlantic Ocean Weather Stations and six other countries whose airlines now fly or intend to fly across the North Atlantic in the near future have been invited to meet in Brighton, England on July 8 to extend the present agreement which maintains ten floating stations manned by 25 ships provided by six nations and aided by cash payments by eight others. The ocean station program is a part of the "Joint Support" system. Cost of the program is distributed among the participants on the basis of the amount of use each country's airlines make of the facilities supplied. The following countries have been invited to attend: Belgium, Canada, Colombia, Cuba, Denmark, France, Iceland, Ireland, Israel, Italy, Mexico, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States and Venezuela. Representatives of the United Nations and the World Meteorological Organization have also been invited.

AIR NAVIGATION CONFERENCE

Air navigation technicians representing 25 nations and four international organizations participated in a conference in Montreal that ended in March. Included in the conference's work were the following:

The conference devised a new and simplified version of *in flight reporting* which recognizes the present-day cockpit workloads, and permits plain language transmission without recourse to complex coding processes on the part of the pilot.

Aids for approach and landing. The conference examined the problem of landing aircraft under poor visibility conditions with an acceptable degree of regularity and recommended certain improvements in the location and adjustment of elements of the instrument landing system. It also provided for a better coordination of the radio, radar and visual aids which are used to enable pilots to land safely under bad weather conditions.

The conference defined the air traffic control requirements for radar equipment, and discussed the technical aspects of surveillance radar and its associated secondary radar.

With modern aids to instrument flight, there may be considerable difference between the determination, at a point on the aerodrome, of visibility and the "slant visibility" which the pilot actually encounters in his shallow oblique approach to the aerodrome. The conference found it impossible to adopt a standardized technique to solve this problem at the present time, but held full discussions which are expected to be very helpful to States in working toward a solution.

Other actions of the Conference included further development of the ICAO Instrument-Approach-to-Land procedures, and agreements on a standard holding pattern for aircraft awaiting their turn to land.

NEW DIRECTOR OF LEGAL BUREAU

Shri P. K. Roy, formerly Deputy Secretary of State in the Indian Communications Ministry, is the new Director of the ICAO Legal Bureau. Mr. Roy was educated at the Najbur University (India) and also in London where he was a barrister-at-law in the Middle Temple. He has held several judicial posts, first as a civil judge and afterwards as an Assistant Solicitor to the Government of India.

SOUTHEAST ASIA AND SOUTH PACIFIC AIR NAVIGATION

The regional meeting of ICAO in Melbourne, Australia developed a detailed plan to provide for the present and future development of air navigation along the international air routes of Southeast Asia and the South Pacific Ocean. The plan takes into account the introduction of new types of aircraft, particularly of jet transports in the area.

Represented at the meeting were Australia, Burma, Canada, Ceylon, China, France, India, Indonesia, Netherlands, New Zealand, Pakistan, Thailand, the United Kingdom and the United States; observers from the World Meteorological Organization, the Federal Aeronautique Internationale, the International Air Transport Association, and the International Federation of Air Line Transport Associations were also present.

Included in the recommendations of the meeting are the following:

Meteorology. Account was taken of the increasing tendency of modern aircraft, particularly of jets, to fly at high altitudes. The revised meteorological plan recommends 530 observation posts for surface weather reporting four times daily, together with certain stations to make upper air observations to a level of 55,000 feet (16,500 metres); 34 forecasting offices and 40 secondary offices were also found necessary for the area. A proposal was also made for the development of a special technique to be used in tropical regions for forecasting upper air winds and weather.

Communications. The meeting adopted a plan which would reorganize the existing aeronautical fixed telecommunications network; an interim plan for the aero mobile services which makes allowance for an increased use of radiotelephony rather than code was evolved. Arrangements were completed for the allocation of the new communications frequencies assigned by the International Telecommunications Union for aviation use, and a proposed timetable for their implementation was laid down. New flight information regions were recommended for the Cocos Islands, Biak and Taiwan, and existing Flight Information Region boundaries were adjusted to meet both the present and future needs of air travel and the requirements of the states which maintain the services.

Aerodromes. The meeting found that lighting of aerodromes for night operations is now the rule rather than the exception in the area; ICAO's newly-standardized high intensity approach lighting system to aid landings at night and in foggy weather was recommended for installation at nine aerodromes in the two regions; the aerodrome plans made at previous ICAO regional meetings were revised to meet the requirements of increased traffic, new routes and new aircraft types.

Altimeter setting procedures. ICAO's standardized altimeter setting procedures are recommended for adoption in the southern portion of the Pacific region; these procedures will now be in operation in most regions of the world.

Proposals and suggestions made by the Melbourne air navigation meeting will now be studied by the permanent Air Navigation Commission in Montreal before being submitted to the Council for approval.

REPORT OF THE CHAIRMAN OF THE UNITED STATES DELEGATION TO THE INTERNATIONAL CONFERENCE HELD AT ROME, ITALY, SEPTEMBER 9-OCTOBER 7, 1952—to adopt a Convention on damage caused by foreign aircraft to third parties on the surface.

Background. This was a diplomatic conference, designated as the first international conference on private air law held under the auspices of the International Civil Aviation Organization. It was convened at Rome, Italy, on September 9, 1952, at the invitation of the Italian Government. Its purpose was to consider the preparation, adoption and opening for signature of a convention dealing with the subject of liability for damage caused by foreign aircraft to third persons on the surface. This subject had been the occasion of extensive work in the Legal Committee of ICAO¹ which resulted in preparation of a draft Convention at the Seventh Session of the Legal Committee in Mexico City, Mexico, January, 1951, which the Committee, at the conclusion of the Session, recommended to the Council of ICAO be dealt with as a final draft insofar as the Legal Committee was concerned.²

Subsequent to the work of the Legal Committee at its Seventh Session, the Council of ICAO devoted substantial attention to certain economic and policy aspects of the draft Convention, particularly those relating to the limits of liability to be embodied in the Convention and to the insurance provisions to be included therein, and made a report, including certain recommendations with respect thereto, which was circulated to the States.³

The Council determined to submit the draft Convention to a special diplomatic conference, with the expectation that such a conference would complete work thereon and would adopt and open it for signature, and with the hope that it would be signed by a substantial number of states. The Italian Government extended an invitation to hold such conference at Rome, Italy. This invitation was accepted, it being deemed particularly appropriate to hold the conference on this subject in Rome inasmuch as the proposed Convention was expected to replace a convention on the same subject prepared at a diplomatic conference in Rome in 1933, generally known in aviation circles as the *Rome Convention*.

Participation. All member states of ICAO were invited to participate in the Conference. In addition, certain other states, primarily those which were members of the United Nations, although not of ICAO, were likewise invited to participate. Representatives of international organizations having an interest in the subject matter of the Conference were likewise invited to attend as observers. 31 states and 6 international organizations were represented at the Conference. 28 of the states participated in the work thereof on a voting basis. The remaining three states and all of the organizations were observers, and as such participated in the deliberations on a non-voting basis.

United States Delegation. The United States Delegation was composed of Emory T. Nunneley, Jr., General Counsel, C.A.B., Chairman; Richard Elwell, General Counsel, C.A.A.; H. Alberta Colclaser, Assistant Chief, Aviation Policy Staff, Department of State; G. Nathan Calkins, Jr., Chief, Inter-

¹ Previous occasions on which provisions of a draft Convention dealing with this subject have been considered included the following: Fourth Session of Legal Committee of ICAO, Montreal, Canada, 1949; Fifth Session of the Legal Committee, Taormina, Italy, 1950 (for text, see 17 JOUR. AIR L. & COM. 194); Legal Commission, Fourth Session of Assembly of ICAO, Montreal, Canada, 1950; Seventh Session of the Legal Committee, Mexico City, Mexico, 1951.

² The Mexico City draft is reprinted in 18 JOUR. AIR L. & COM. 98 (1951).

³ ICAO Council, Fourteenth Session, DOC 7238, C/836, 20/12/51. See, 19 JOUR. AIR L. & COM. 211 (1952).

national and Rules Division, Office of General Counsel, C.A.B., and Norman Seagrave, Civil Air Attache, Rome, Italy. In addition, Mr. Edward C. Sweeney, professional staff member of the Senate Committee on Interstate and Foreign Commerce, was accredited to the Delegation as an adviser. Mr. Seagrave, it may be noted, had previously participated extensively in the work of the Council of ICAO on this subject, having at that time been United States Alternate Representative on the Council. Mr. Sweeney in his capacity as adviser contributed valuable assistance to the work of the Delegation during a considerable portion of the Conference.

The Chairman of the Delegation was given full powers by the President of the United States to sign any Convention on the subject matter before the Conference adopted by the Conference and opened for signature, if that appeared to be an appropriate course of action at the conclusion of the Conference.

Organization of the Conference. The opening meeting of the Conference was held on September 9, 1952. At that meeting, after the adoption of the provisional agenda, the meeting proceeded to the election of the officers of the Conference. Professor Tomaso Perassi of Italy was elected President of the Conference. Thereafter, Mr. J. E. van der Meulen of the Netherlands was elected first vice president, Dr. T. F. Reis of Brazil second vice president, and Justice E. Alten of Norway third vice president. A total of 43 plenary meetings of the Conference were held during the four weeks of its existence. As the work of the Conference progressed, there were appointed a number of committees and working groups to examine and report on specific subjects.

Substantive Work of the Conference. The only subject matter which was before this Conference was the final preparation of a Convention dealing with questions of liability for damage caused by foreign aircraft to third persons on the surface, including the limits of such liability, the security which could be required of aircraft operators to assure their financial responsibility to meet such liability, and the means available for enforcing such liability. The Conference devoted its entire attention to this subject matter over a period of four weeks and, as a consequence, evolved a convention officially described as "Convention on damage caused by foreign aircraft to third persons on the surface," which was adopted by the Conference and opened for signature on October 7, 1952.⁴

There is attached hereto as an Annex a summary analysis of the provisions of the Convention. It is hoped that this summary will aid those not familiar with the subject matter in understanding the general purpose and scope of the Convention, and will be of aid and assistance in considering the position which the United States should take with respect to possible signing and ratification of the Convention. It should be emphasized that such analysis necessarily provides only a general outline of the Convention and is not intended by any means to be an exhaustive examination of the provisions of the Convention, or of all the detailed problems which they may present, nor does it purport to deal with the relation of such provisions to established legal concepts in the United States.

Formal Status of the Convention. The Conference at its conclusion adopted the Convention and opened it for signature. The Convention provides that it shall come into effect initially when five states have ratified the Convention, the effective date to be the ninetieth day after deposit with ICAO of the fifth such ratification. Thereafter, the Convention will come into force as to each state ratifying or adhering to it on the ninetieth day after deposit with ICAO of the instrument of ratification or adherence. The Convention remains open for signature by any state until it first comes

⁴ The official text is printed in 19 JOUR. AIR L. & COM. 447 (1952).

into effect. Any signatory state may ratify the Convention. Any non-signatory state may become a party by adherence at any time. It is expressly provided that no reservations to the Convention may be made.

Fifteen states signed the Convention at the close of the Conference on October 7, 1952. In addition, three states have signed the Convention since the conclusion of the Conference.⁵ To date, however, no signatory state has ratified the Convention.

The United States Delegation did not sign the Convention on behalf of the United States because it considered that the provisions thereof had so far departed from the basic concepts which the United States had sought to have embodied in the Convention as to require further careful consideration and study to determine whether such a step should be taken.

It is not practicable to delineate in this report all of the many considerations which it is believed must be taken into account in determining whether on balance the United States should sign and ratify this Convention. Among the major considerations which led the Delegation to refrain from signing the Convention at the conclusion of the Conference, because it believed that there was a need for further careful study of the provisions of the Convention, are the following:

(1) The adoption of the principle of absolute liability of the operator for any damage caused by his aircraft, regardless of the existence of fault. Related to this is the extent of such liability for damage caused by noise or other disturbance accompanying passage of an aircraft without any physical contact.

(2) The relatively low limits of liability provided, particularly with respect to large transport aircraft. The Convention contains a scale of limits starting at approximately \$33,000 and increasing according to weight, but with the rate of increase becoming progressively lower as the weight increases. Under this scale, the maximum liability for the largest plane in commercial operation today would be \$800,000.

(3) The provision of an individual limit of liability for injury or death of any one person of \$33,000.

(4) The imposition of absolute liability without any limit in the amount thereof (1) in cases of deliberate acts done with the intent to cause damage, including cases where such acts were those of a servant or agent acting in the course of his employment and within the scope of his authority, and (2) in cases where a person wrongfully takes and makes use of an aircraft without consent.

(5) The provisions governing security for the operator's liability which incorporate the principle that the nation being overflown, while entitled to require insurance or other security for an operator's liability, is compelled to accept as sufficient evidence of the financial responsibility of an insurer the certificate of the nation of registry of the aircraft or of the nation of the domicile of the insurer as to such financial responsibility, and the related provisions necessarily required to provide for the administration of this system of certificates.

(6) Inclusion in the Convention of the so-called "single forum" solution of the problem as to where actions for damages under the Convention can be brought under which any such actions can be brought only in the courts of the state where the damage occurred, except in certain limited circumstances where the parties agree upon a different forum, and of the related requirement that judg-

⁵ The states which have signed the Convention are listed in 19 JOUR. AIR L. & COM. 443.

ments rendered in the single forum be executed by the courts of other states, subject to specified exceptions.

Before any further action on behalf of the United States in relation to this Convention is taken, it is believed necessary that there be a detailed analysis of its provisions, and consideration of the benefits that may be derived and the detriments that may be suffered from becoming a party thereto. Furthermore, it is recommended that prior to any conclusion being reached, all persons and groups whose interests may be affected should be given an appropriate opportunity to make their views and comments known. It is believed that the established procedures of the Air Coordinating Committee should be utilized to obtain such views and comments, to review the matter and to make appropriate recommendations to the Department of State.

Final Act of Conference. At its conclusion, the Conference adopted a Final Act.⁶ There was attached to this Final Act recommended forms for the following documents: (1) certificate of insurance, (2) certificate of financial responsibility to be endorsed on or annexed to the certificate of insurance, (3) certificate of guarantee, (4) certificate of deposit, and (5) certificate of government guarantee. All of these certificates are referred to in Article 15 of the Convention. The Conference recommended these forms to the attention of the States, but the Convention itself contains no reference to these forms, and their use is entirely optional.

The Conference also adopted a resolution recommending that ICAO instruct its secretariat and the Legal Committee of ICAO to study a system of settlement of international private law disputes that may arise from the Convention adopted at Rome or from any other aviation convention. Several alternative proposals as to tribunals to which such disputes might be submitted were suggested in the resolution, with the recommendation that ICAO make an immediate inquiry of the states to ascertain objections that might exist in such states to any of the several systems for settlement of disputes under air law conventions thus suggested. This resolution, which is at most a preliminary step in the consideration of any such project, reflects a continued interest by a few states in an effort to establish an international tribunal for the hearing of disputes involving the construction and application of international air law conventions.

EMORY T. NUNNELEY, *Chairman*

SUMMARY ANALYSIS OF CONVENTION ON DAMAGE CAUSED BY FOREIGN AIRCRAFT TO THIRD PERSONS ON THE SURFACE—Annex to Delegation Report.

The following is an attempt to analyze in a summary and preliminary fashion only the provisions of the Convention completed at the first international Conference on private air law held under the auspices of I.C.A.O. in Rome, Italy. It does not purport to be exhaustive in its treatment of the provisions of the Convention, but rather is intended to serve only as a basis for general understanding of the nature of the provisions of the Convention, of the more significant problems which they pose, and as a possible guide to further exploration of these matters in more detail. Furthermore, it is limited to consideration of the provisions of the Convention itself and the problems which may be discerned to exist under those provisions. This summary does not undertake to set forth or evaluate the contentions for or against the validity or desirability of the provisions which have been incorporated in the Convention, or to deal with questions of the relation of such provisions to established concepts of law in the United States.

⁶ Printed in 19 JOUR. AIR L. & COM. 458.

In evaluating the provisions of this Convention it is, of course, important to bear in mind the fact that, being an international convention, the provisions thereof must be considered not only in light of the manner in which they are likely to be construed and applied in courts of the United States and courts of nations having a common law tradition, but also how they are likely to be construed and applied in the courts of other nations, particularly those having systems, concepts, and traditions of law different from those of the United States. In looking at this subject from the United States' standpoint, it should be noted that if the United States were to become a party to the Convention, ordinarily the provisions of the Convention would be before courts in the United States for construction and application in those situations in which the persons suffering damage are residents in the United States and the aircraft causing the damage is a foreign aircraft. On the other hand, the liability of the operators of aircraft of United States registry will ordinarily be determined under the Convention by a court of the foreign country in which the damage occurred, which court will have the responsibility for construing and applying the provisions of the Convention in such case.

Exclusive Nature of Remedies. This Convention undertakes to provide an exclusive system of liability and of limits of liability with respect to the matters which are covered by it. Thus, Article 9 of the Convention provides that neither the operator nor owner of an aircraft, nor their servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than as expressly provided in the Convention. In other words, any cause of action to be asserted against the owner or operator of a foreign aircraft for damage on the surface caused by such aircraft, or anything falling therefrom, must be asserted in accordance with the terms of the Convention and where the Convention does not authorize recovery, no recovery is permitted. This is subject only to the exception that the remedies under the Convention are not exclusive as against any person who is guilty of a deliberate act or omission done with intent to cause damage. While the person so acting is subject to liability under the provisions of the Convention, if liability exists pursuant thereto, in such case the remedies provided by the Convention are not exclusive, and a person guilty of a deliberate act or omission done with intent to cause damage may also be held liable in accordance with provisions of national law outside of and differing from the Convention.

Applicability. The Convention applies only to damage caused in the territory of one contracting state by aircraft registered in the territory of another contracting state. Accordingly, the Convention has application only where a foreign aircraft is involved in the incident causing the damage, and does not have application where damage is caused by a domestic aircraft, that is, an aircraft registered in the country on whose surface the damage is caused. Likewise, the Convention does not apply to another aircraft in flight, or to persons or property on board such an aircraft. The Convention does not apply, of course, to damage caused to passengers or property on board the aircraft causing the damage.

Nature and Extent of Liability. The basic premise of the Convention is that it imposes absolute liability upon those who are by its terms made responsible for the operation of the aircraft. Liability is absolute in the sense that it exists irrespective of whether there was any fault on the part of the person made liable. Practically no defenses against liability are permitted. Essentially, the person responsible for putting an aircraft in the air is held liable for the death or injury of any person on the surface or damage to any property on the surface which is caused by such aircraft while in flight, or by any person or thing falling from such an aircraft.

Liability for damage can exist under the Convention in the absence of any physical contact between the aircraft and the person or property on the surface. The Convention requires only that the person suffering damage prove the damage to have been caused by an airplane in flight.

Liability is limited, however, by the provision that "there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto." This is an evident effort to prevent the chain of causation from being extended to damage which is only an indirect or remote consequence of the incident asserted to have caused it. The difficulties and lack of uniformity to be anticipated in the application of this standard seem self-evident, particularly since the representatives of many countries indicated that difficulty would be encountered in applying this concept in the courts of their countries.

It is also provided that there shall be no right to compensation "if the damage results from the mere fact of passage of the aircraft through the air space in conformity with existing air traffic regulations." This provision bars any recovery for damage resulting from the mere passage of an aircraft which is doing so in conformity with existing air traffic regulations. It will be at once evident that this provision poses a difficult problem with respect to the status under the Convention of actions seeking recovery for damage due to noise and vibration accompanying the passage of aircraft. Thus it would appear that no recovery can be had for damage caused by noise normally and usually incident to the passage of an aircraft, if that aircraft were observing the existing air traffic regulations. On the other hand, if the aircraft were in any way violating the existing air traffic regulations at the time of its passage, there would be absolute liability for any damage which was the direct consequence of noise incident to its passage. It is evident that this provision poses questions concerning the existence of liability (1) where the passage is accompanied by unusual or abnormal noise or vibration, or (2) where the damage results from the accumulated effect of the repeated passage of a number of aircraft, as, for example, in the vicinity of an airport, even though each passage is in conformity with the air traffic rules and is otherwise normal. The Convention does not, of course, purport to deal with the question of injunctive relief against a nuisance created by the operation of aircraft.

Further provision is made in Article 7 for liability in the case of damage on the surface resulting from a collision of two aircraft, or where two aircraft have interfered with each other in flight. In such case, each of the aircraft concerned is considered to have caused the damage, and the operator of each aircraft is jointly and severally liable therefore to the person suffering the damage on the surface. Again this liability is imposed without regard to fault on the part of either operator. The Convention does not, of course, affect the rights of the operators as against each other, or for damage to any person or property on either plane.

Defense Against Liability. Any person who would otherwise be liable under the Convention is relieved of such liability if damage is "the direct consequence of armed conflict or civil disturbance, or if such person has been deprived of the use of the aircraft by act of public authority." Every effort during the Conference to enlarge the defenses thus afforded the person otherwise liable was defeated by a substantial margin. The Conference would not accept even a provision to relieve an operator of liability where the damage was the direct consequence of the deliberate act of a third person done with intent to cause damage which the operator could not reasonably have foreseen or prevented. This is illustrative of the single-mindedness with which the Conference adhered to the principle of absolute

liability, an attitude which was also illustrated in connection with other provisions of the Convention.

Provision was, however, made for relieving the person otherwise liable from liability where the damage was caused solely by the negligence or wrongful act of the person injured, or his servants or agents. If the damage was contributed to by the negligence or other wrongful act of the person injured, or his servants or agents, the damage is to be reduced to the extent to which such negligence or wrongful act contributed thereto. Thus, where the person injured is partly at fault, there is an apportionment of fault as between the parties, and damages are assessed accordingly. The provision contemplates a determination of the total damage suffered by the person on the surface, of the extent to which the injured person's negligence or other wrongful act contributed to such damage, and assessment of the difference against the aircraft operator, subject only to the provision that there shall be applied to the amount so determined applicable limits under the Convention, so that the operator's liability will never exceed such limits.

Persons Liable. Basically, liability under the Convention is assessed against the operator of an aircraft, who is defined in Article 2 as "the person who is making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator." This definition, and the effort to clearly determine who was the operator of an aircraft in all circumstances, was one of the most difficult problems under the Convention. Doubtless this definition, as did any others offered, leaves some areas of uncertainty or marginal cases which can only be resolved by the application of the Convention over a substantial period of time.

The person who is by definition the operator of an aircraft remains as such when the aircraft is being used by his servants or agents in the course of their employment, whether or not within the scope of their authority. Thus, whenever an employee is using an aircraft in the course of his employment, the employer remains liable for damage on the surface caused by such aircraft because he remains the operator. The circumstances under which the servant or agent may also be liable are referred to below.

The Convention provides that the registered owner of an aircraft is presumed to be the operator, and hence is liable as such unless in the proceedings for the determination of his liability (1) he proves that some other person was in fact the operator and (2) to the extent that the legal proceedings in the court where the proceedings are pending permit, he takes appropriate measures to make such other person a party to the proceeding. It will be readily seen that this imposes a considerable responsibility on the registered owner where he is not the operator (as, for example, where he is the lessor under a long-term lease), placing on such owner the possible necessity of affirmative action in a foreign court if he is to avoid liability. However, where the registered owner does meet the prescribed burden of proof and takes the appropriate procedural steps, he is relieved of all liability.

In addition to the operator, in certain circumstances a person who by definition is not the operator is nevertheless jointly and severally liable with the operator. This occurs in the following situations:

1. Where the person entitled to control the use of an aircraft has leased the aircraft or otherwise authorized another person to use the aircraft, but has not vested in him the exclusive right to use the aircraft for a period of more than 14 days, the former remains jointly and severally liable with the person actually using the aircraft at the

time the damage is caused. To illustrate, where a fixed base operator rents a plane by the hour or the day, both the person renting the plane and the fixed base operator are jointly and severally liable for damage caused by such aircraft. Likewise, where an aircraft of one air carrier is operated over the route of another under an interchange, since the exclusive use of the plane does not pass, both carriers are jointly and severally liable.

2. Where the aircraft is used by another person without the consent of the person entitled to its navigational control, the latter is jointly and severally liable unless he is able to prove that he exercised due care to prevent such unauthorized use. Such liability may exist where the use without consent is by servants and agents of the person entitled to control. Thus, if a servant or agent uses a plane outside the course of his employment, the principal, in order to escape liability, must show that he exercised due care to prevent such use.

It should be noted that the person who uses an aircraft without consent of the person entitled to navigational control thereof, or the person who has a lease of less than 14 days or a right to use which is not exclusive, is not relieved of liability. Such person is liable as the operator for damage caused on the surface, and his liability is not affected by the existence or non-existence of liability on the part of the person entitled to navigational control. Where such liability does exist, it is joint and several. However, although perhaps not wholly certain, it appears that servants or agents are never liable under the Convention while acting in the course of their employment, since in such cases it is expressly provided that the principal shall be considered to be making use of the aircraft and hence by definition is the operator.

Limits of Liability. The Convention provides that liability thereunder shall not exceed maximum limits determined by a scale¹ which starts at \$33,000 for aircraft of less than 2,200 pounds gross weight, and increases with increasing weight, but with the rate of increase becoming progressively less in the higher weight brackets. There is no absolute maximum, but for an aircraft of 110,000 pounds gross weight the maximum liability is \$700,000, and for each pound over 110,000, the liability is increased nearly \$7.00. There is attached hereto a graph which shows the scale provided by the Convention, and indicates the point of the scale at which transport aircraft generally in use are located. The maximum limits thus provided represent the total recovery which may be achieved by all claimants against each aircraft for each incident resulting in damage. These limits are removed in certain circumstances discussed below.

In addition to the overall limit, there is also imposed a limit of \$33,000 for injury to or the death of any one person.

Unlimited Liability. It is provided that in certain circumstances, liability shall be unlimited. Thus, whenever the person damaged proves the damage was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability is unlimited, provided further that where the act or omission is that of a servant or agent, the person damaged must also prove that the servant or agent was acting in the course of his employment and within the scope of his authority in order to establish unlimited liability on the part of the principal. This is one of the crucial points in the Convention, for bearing in mind that the Convention imposes absolute liability, the circumstances under which un-

¹ Since the scale is in terms of kilograms and gold francs, the dollar figures stated are the closest approximation in round figures. See also footnote 1, 19 JOUR. AIR L. & COM. 448.

limited liability will exist become very important. The Conference evidenced much concern over how to provide for unlimited recovery in appropriate circumstances where a corporation, which necessarily acted through its officers and employees, was the operator, without at the same time imposing so difficult a test that offenses "against the public order" would nevertheless be protected by the limits of the Convention. Contentions that such matters should be dealt with by criminal sanctions were unavailing. The test provided puts the burden upon the claimant to prove that the servant or agent acted in the course of his employment and within the scope of his authority. An effort to restrict unlimited liability to cases where the principal failed to prove that the servant or agent did not have express authority for the act or omission causing the damage was rejected, many representatives arguing that it would mean virtual assurance that unlimited liability could never be assessed against a corporation.

Similarly, if a person both wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, the person so taking and using the aircraft is subject to unlimited liability. The contrast between the language thus used in Article 12(2) and that used in Article 4 is worth noting, the emphasis here being on the wrongful taking as well as the unauthorized use. This provision, however, doubtless poses significant difficulties in interpretation and application. There were indications that some would contend that it should be construed to cover any "conversion" of the property by the user. The serious problem is under what circumstances unlimited liability will be imposed in the case of unauthorized use of an aircraft by a person who originally acquired possession and use of the aircraft in a lawful and authorized manner. This is illustrated by the use of an aircraft by a lessee after the term of the lease has expired, or in a manner not authorized by the lease. Although there was no wrongful taking of possession in the first instance in such a case, it is by no means clear that it will not be held that a technical taking occurred and that the user is subject to unlimited liability in what might be a valid dispute over the terms of a lease.

Joint and Several Liability. No person is liable for more than the limits applicable to the aircraft in relation to which his liability arises, except, of course, in those circumstances in which unlimited liability exists.

The person damaged by an incident in which only a single aircraft is involved cannot recover total compensation greater than the amount of the highest liability of any one person liable. Where two or more aircraft are involved in the incident causing damage, however, the person damaged can recover up to the aggregate of the limits applicable to all the aircraft involved in the incident, but no operator is liable for more than the limits applicable to his aircraft.

Apportionment where losses exceeds limits of liability. One of the difficult problems in the Convention was the apportionment of the amount of compensation available where the losses exceeded the limits of liability. Some method of apportionment was essential. The solution included in the Convention provides that if all claims are for personal injury or death, or all are for damage to property, the claims established shall be reduced proportionately to bring the total down to the maximum limits. In no event, of course, can the liability for one person's injury or death exceed \$33,000. Presumably the individual limit of \$33,000 is applied to any claims before determining whether the maximum limits would be exceeded and reduction proportionately is required.

Where there are claims both with respect of loss of life or personal injury and damage to property, one half of the total amount available is appropriated preferentially to meet claims in respect to loss of life and personal

injury. Where this is more than sufficient to meet the claims for death and personal injury, all of the unused total is then used to satisfy the claims for property damage. However, if the half preferentially appropriated is insufficient to meet claims for personal injury and death, such amount is distributed proportionately among the such claims concerned, and the other half of the total sum available is distributed proportionately among the claims for damage to property and the unsatisfied portion of the claims for death and personal injury.

Security for Operators' Liability. The Convention provides that any contracting state may require the operator of an aircraft registered in another state to be insured in respect of his liability for damage by means of insurance up to the limits provided in the Convention. The operator may be required to insure only his own liability, not that of anyone else who may be liable in respect of damage caused by such aircraft. The state overflown is not permitted to require that the liability of any person other than the operator shall be insured. Thus, in the case of a person renting a plane for less than 14 days, only the liability of the person using the plane can be required to be insured, not that of the lessor.

The state overflown is required to accept the insurance as satisfactory if it conforms to the provisions of the Convention and if it has been effected by an insurer authorized to effect such insurance under the laws of the state where the aircraft is registered or of the state where the insurer has his residence or principal place of business, and whose financial responsibility has been verified by either of those states. The Convention does not prescribe what a state undertakes when it "verified" the financial responsibility of an insurer, or what standards it shall employ in so doing. Any state overflown may refuse to accept as satisfactory insurance effected by an insurer who is not authorized for that purpose in a state party to the Convention. The purpose of this latter provision is to assure that the rights with respect to such insurance given by the provisions of the Convention, such as those with respect to available defenses and direct recourse against the insurer in certain circumstances, will be in effect with respect to the insurance in question.

It is further provided that in any case where insurance has been required by the state overflown, and a final judgment in that state has not been satisfied by payment in the currency of such state, any contracting state may thereafter refuse to accept the insurer as financially responsible until such payment, if demanded, has been made. Article 27 further provides that every state will, as far as possible, facilitate payment of compensation in the currency of the state where the damage occurred. These provisions were intended to surmount the problem which is presented by questions of restricted or blocked currencies, which could, of course, make insurance written by an insurer in one country of little value in the country overflown. This problem is of obvious interest to the United States. It is believed these provisions afford considerable incentive towards payment in currency of the country where the damage occurred.

The state overflown may require an aircraft to carry a certificate issued by the insurer certifying that insurance has been effected in accordance with the provisions of the Convention, and also a certificate or endorsement by the appropriate authority in the state where the aircraft is registered or in the state where the insurer has his residence or principal place of business certifying the financial responsibility of the insurer. Instead of carrying the certificate, it can be filed either in the state overflown or with ICAO in advance of the flight. The phrase "appropriate authority in the state" is defined to include the appropriate authority in the highest political subdivision thereof which regulates the conduct of business by the insurer.

This latter provision was included for the specific purpose of enabling the certificate requirement to be met in the United States and a few other nations where insurance is not regulated by the federal government, by a certificate issued by the state governments.

Where the state overflown has reasonable grounds for doubting the financial responsibility of an insurer, that state may request additional evidence of financial responsibility. If any question arises as to the adequacy of the evidence, the dispute affecting the states concerned shall, at the request of one of the states, be submitted to an arbitral tribunal which shall be either the Council of ICAO or a person or body mutually agreed upon by the parties. However, until this tribunal has given its decision, the insurance in question is required to be considered provisionally valid by the state overflown. No provision is made as to the time within which arbitration must be commenced or completed. Nor is it made clear whether, in the event of the failure of the parties to agree upon another person or body, the Council of the ICAO automatically becomes the arbitral tribunal. With these matters left unsettled, it seems evident that the provision for arbitration affords little opportunity for the state overflown to assert effectively any doubts it may have with respect to the financial responsibility of a given insurer.

Defenses of the Insurer. The insurer is entitled to assert only certain defenses. He is entitled to assert the defenses available to the operator (the limited nature of these has already been indicated), the defense of forgery and the following:

- (a) That the damage occurred after the security ceased to be effective.
- (b) That the damage occurred outside the territorial limits provided for by the security, unless the flight outside of such limits was caused by *force majeure*, assistance justified by the circumstances, or an error in piloting, operation, or navigation.

In certain circumstances, insurance is required to be continued in effect beyond the time when it would otherwise have been terminated. Insurance is automatically required to be continued in force if it expires during a flight until the next landing specified in the flight plan. If it ceases to be effective for any reason other than the expiration of its term or a change of operator, it is continued in effect for 15 days after notification to the appropriate authority of the state which certified the insurer's financial responsibility, or until effective withdrawal of the certificate of the insurer has been accomplished, whichever is earlier.

Where a certificate of insurance has been issued and the operator insured is changed during the term, the insurance is made applicable to the liability of the new operator, unless he is an unlawful user, for a period of 15 days from the time when the insurer notifies the appropriate authority of the state where the certificate was issued, or until the effective withdrawal of the certificate of the insurer, whichever is shorter.

The state which has issued or endorsed a certificate, having received notice of termination of the insurance from the insurer, is to notify other interested contracting states thereof as soon as possible. However, there is no specific time limit within which the states are required to give such notification. The only state which the insurer is required to notify to start the 15-day period running is the state which certified the insurer's financial responsibility. This may not even be the state of registry of the aircraft. Thus, the 15-day period during which the insurance is continued in effect may run before the state overflown is notified that the insurance has been terminated. It has no way of protecting itself against this possibility, but must rely on the prompt performance by the certifying state of its duty to

notify other states. Whether an insurer, by giving notice directly to a state other than the certifying state, can accomplish effective withdrawal of the insurance is not clear.

The Convention provides that nothing in it shall prejudice any right of direct action which the person suffering damage may have under the law governing the contract of insurance, and that in addition such person shall have a direct action against the insurer where the insurance is continued in force by the provisions of the Convention as discussed above and in event of the bankruptcy of the operator.

The Convention permits the furnishing of certain other types of security in lieu of insurance. These are (1) a cash deposit in a depository maintained by the contracting state where the aircraft is registered, or (2) a guarantee by a bank authorized to do so by the contracting state where the aircraft is registered and whose financial responsibility has been verified by that state, or (3) a guarantee given by the contracting state where the aircraft is registered, if that state undertakes that it will not claim immunity from suit in respect of that guarantee.

While it was not thought that these types of security would be often used, they were deemed to be necessary by some states in order to meet unusual or exceptional circumstances. Where such security is furnished, it is required to be specifically and preferentially assigned to the payment of claims under the Convention. It is required to be in an amount equal to the limit applicable to the two aircraft operated by the operator having the highest limits of liability under the Convention. Furthermore, as soon as a notice of claim has been given to the operator, the amount of the security is required to be increased to total the amount of security otherwise required, plus the amount of the claim up to the applicable limits of liability. Many of the provisions relating to insurance are equally applicable to other forms of security. They will not be repeated here.

Jurisdiction. The Convention provides that actions to enforce liability under the Convention may be brought only before courts of the contracting state in which the damage occurred, except that by agreement between any one or more of the complainants and any one or more of the defendants, such claimants may bring an action before the courts of any other contracting state. No such proceeding can prejudice in any way the rights of persons who bring action in the state where the damage occurred. In other words, where a defendant agrees that an action may be brought in the courts of a state other than that where the damage occurred, such defendant must take the risk that in any action brought in the state where the damage occurred recovery will reach the limits of liability under the Convention. He cannot assert the existence of the other action, or any judgment therein, to defeat liability up to the full limits under the Convention in any action in the courts of the state where the damage did occur. Even where only one person was injured, he is limited to bringing suit in the courts of the state where the damage occurred, unless both he and the operator can agree otherwise. Even though it be clearly evident that the claims asserted do not exceed the limits of liability of the operator, the forum cannot be changed without the consent of the parties.

Provision is made for taking appropriate measures to give the defendant and any other interested parties notice and a fair and adequate opportunity to defend. Each contracting state shall so far as possible insure that all actions arising from a single incident are consolidated for disposal in a single proceeding before the same court. That procedural difficulties may be encountered in achieving this objective seems self-evident. It would appear particularly to pose a problem for the United States. It was in recognition of the difficulties which might be encountered by various states

in fully implementing this undertaking that states agreed to do it "so far as possible."

Execution of Foreign Judgments. The Convention provides that a final judgment, which is pronounced by a court competent in conformity with the Convention, shall be enforceable upon compliance with the formalities prescribed by the laws of the contracting state where execution is applied for, and that execution may be sought (a) in the contracting state where the judgment debtor has his residence or principal place of business or (b) if the assets available in that state and in the state where the judgment was pronounced are insufficient, in any other contracting state where the judgment debtor has assets. Thus, where a competent court in the state where the damage occurred has rendered a final judgment, the courts of the contracting state where the judgment debtor has his residence or principal place of business, or, in the appropriate circumstances, the courts of any other contracting state, are required to execute such judgment.

However, the duty to execute a foreign judgment is subject to important exceptions. The court to which application for execution is made may refuse execution upon a number of grounds which go far towards preserving the right of such court to assure itself that the judgment was fairly obtained and is properly enforceable. In addition to certain specified grounds, execution may be refused if the judgment concerned is contrary to the public policy of the state in which execution is requested.

The Convention provides that a claimant may bring a new action in the courts of any state in which execution of a judgment obtained in another contracting state has been refused.

In such new action, the old judgment is a defense only to the extent it has been satisfied, and the old judgment ceases to be enforceable as soon as the new action is instituted.

Where a judgment is enforceable under the Convention, the payment of costs recoverable under the judgment is likewise enforceable, provided that the court applied to for execution may limit the amount of such costs to a sum equal to ten per cent of the amount for which the judgment is rendered enforceable. The costs allowed are in addition to the limits of liability prescribed by the Convention.

Period of Limitation. Actions under the Convention must be brought within two years from the date of the incident causing the damage, but such period may be suspended or interrupted in accordance with the law of the court trying the action for an additional period of one year. The right to action is extinguished upon the expiration of three years from the date of the incident which caused the damage. However, if a claimant has not brought an action thereon or given notice of his claim to the operator within six months of the incident, such claimant is entitled to compensation only out of the amount for which the operator remains liable after all claims made within the six months have been met in full. The establishment of this six months provision was designed to aid in permitting the operator or his insurer to settle claims without being compelled to wait out a full two-year period.